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February 18, 2000

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FEDERAL COMMUNICATIONS COMMISSION
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BY HAND DELIVERY

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Re: Applications of Sprint Corporation, Transferor, and MCI WorldCom, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 1, 21, 24, 25, 63, 73, 78, 90, and 101, CC Docket No. 99-333

Dear Ms. Salas:

Enclosed for filing are an original and four copies of the Opposition of SBC in the above-captioned matter.

If you have any questions, please call me at 202-326-7969. Thank you for your assistance in this matter.

Sincerely,

Rachel Bar

Rachel E. Barkow

REB/sls
Enclosures

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List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	
SPRINT CORPORATION,	)	
Transferor,	)	
and	)	
MCI WORLDCOM, INC.,	)	CC Docket No. 99-333
Transferee,	)	
for Consent to Transfer Control of Corporations Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 1, 21, 24, 25, 63, 73, 78, 90, and 101	)	

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OPPOSITION OF SBC COMMUNICATIONS INC.

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February 18, 2000

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Executive Summary

This Commission has repeatedly held that the proponents of a merger must demonstrate convincingly that the merger will enhance, rather than hinder, competition. MCI WorldCom and Sprint have utterly failed to bear that burden. Indeed, they do not even dispute that the proposed merger would eliminate substantial and direct competition in three immensely important, already-concentrated segments of the telecommunications industry: long distance voice, long distance packet switched data services, and Internet backbone. Under the well-established analytical frameworks applicable to this transaction – frameworks that have been repeatedly and recently endorsed by this Commission – the merger is simply unthinkable.

MCI WorldCom and Sprint have elsewhere acknowledged the Commission's "well-established standards for merger reviews," but their response here is to dismiss the established analytical frameworks as irrelevant to some future telecommunications industry of their own imagining. But this merger must be evaluated today, under current market conditions. In that context, it must be rejected. The anticompetitive harms are enormous. And MCI WorldCom and Sprint have not even begun to make a case that countervailing efficiencies or other public-interest benefits can overcome those harms.

The long distance market is already highly concentrated – in Chairman Kennard's words, it is "just a merger away from undue concentration." This is that merger. It would create an outright duopoly, consolidating almost 80% of all long distance revenues in just two hands.

The proposed merger would drastically reduce competition in both the mass long distance market and the larger business long distance market. Unlike the MCI/WorldCom merger, where only one of the merger partners had any significant presence in the mass market, this proposed merger would combine two of the top three competitors in the market for service to residential and small business customers. Measured by the Herfindahl Hirschman Index ("HHI"), the merger's effect on concentration in the mass market segment would be off the charts. It would result in an increase of more than 200 points in the HHI of the residential interexchange market, taking that measure to almost 4000.

In the larger business segment, the picture is equally grim. The larger business market today is slightly less concentrated than the mass market. But the market shares of MCI WorldCom and Sprint are higher, which makes the HHI increase for long distance business voice customers – more than 800 points – all the more alarming.

Even more alarming is the effect of the merger on long distance data services such as frame relay, asynchronous transfer mode ("ATM"), X.25, and switched multimegabit data services ("SMDS"). The merger would result in more than an 1100-point increase in the HHI for this market segment – *eleven* times the amount necessary to create a presumption of unlawfulness under the standard guidelines.

The HHIs are damning, that much is clear. But the competitive threat posed by the merger runs even deeper than those scores reveal. MCI WorldCom and Sprint are closer substitutes for one another than either is for AT&T. To the extent these two companies compete for customers, they compete with one another more than they compete with any other carrier. Eliminating the competition between MCI WorldCom and Sprint will damage competition even more than a typical three-to-two merger would.

This pattern holds true for larger business customers as well. Even before the break-up of AT&T, MCI and Sprint competed with one another to provide service innovations that would allow them to compete for institutional customers. To the present day, MCI WorldCom and Sprint develop specialized offerings – especially data transmission offerings – that allow them to win the customers they target. The proposed merger would eliminate a rivalry that has driven the development of specialized service offerings that define this market segment.

The Internet backbone market is another crucial, highly concentrated market that would be harmed by this merger. MCI WorldCom is already far and away the largest provider of Internet backbone services. Sprint is number two, and together they would account for at least half of the market for such services. In various public statements, the Applicants appear to have recognized that the proposed union of their Internet businesses is a pipe dream. But even the divestiture of Sprint's backbone could not be counted upon to protect competition in this area. The divestiture of MCI's Internet business, undertaken as a condition of the MCI/WorldCom merger, has been a notable failure. There is no reason to believe that a re-run would have a different ending.

Perhaps recognizing that their merger is virtually inconceivable under any standard of traditional antitrust analysis, MCI WorldCom and Sprint contend that such standards have no place in the review of this merger. Instead, they argue that the Commission should look to what they call an "all distance" market of bundled service offerings, which the Applicants believe erases the divide between long distance and local service. This approach is deeply flawed, for at least two reasons.

First, in today's markets, the overwhelming majority of consumers purchases long distance service as a distinct, stand-alone product. For these consumers, the merger is hopelessly anticompetitive. Second, the merger is dangerous even for those consumers who do purchase long distance bundled with other services. Any consumer interested in purchasing a service package that includes long distance will necessarily suffer the adverse effects of decreased competition in the long distance industry.

As more regional Bell operating companies ("RBOCs") win authorization to provide in-region, interLATA service, more customers may purchase both local and long distance service from the same provider. But it does not necessarily follow that the traditionally distinct local and long distance markets will thereby collapse into one another. Nor does it follow that the Commission should be any less concerned about undue concentration in one of the critical elements of such a "bundled" package.

In any event, as this Commission knows, the timing of RBOC entry is not sufficiently certain to allay the competitive concerns that arise from this merger. Such entry has occurred in only one state (New York), and the process of securing regulatory approval has proved itself to be a lengthy one. Indeed, although the Applicants now describe RBOC entry as "imminent," they are waging an ongoing fight against such entry. Elsewhere, in fact, MCI WorldCom and Sprint describe RBOC bids to carry in-region, interLATA traffic in terms such as "extremely premature" or "highly contingent."

The Applicants also defend the merger on the basis of what they describe as "new" capacity in the long distance market. This argument relies on a host of "second-tier" carriers, many of whom are building networks and increasing capacity. But many of these carriers disdain mass market customers altogether, and none can match the ubiquity of the Big Three. In any event, raw capacity is only one of many important factors that determine a carrier's ability to compete. In the mass market, competition for customers turns more on a carrier's brand name and service reputation than it does on capacity. And no second-tier carrier can hold a candle to the Big Three's respective brand identities, which have been built over decades with massive advertising campaigns that are beyond the means of smaller carriers.

Even in the larger business segment, MCI WorldCom's and Sprint's market shares derive not just from their capacity, but also from their geographic ubiquity and ability to offer a full range of services, especially data services, throughout the country. The second-tier carriers simply cannot match the ubiquity of the Big Three that is necessary to compete for these large business customers. They thus stand little chance of disciplining the exercise of market power by MCI WorldCom/Sprint.

In response to the obvious and demonstrable competitive harms of the proposed merger, MCI WorldCom and Sprint have failed to articulate any countervailing public-interest benefits associated with the merger. They defend the merger on the ground that it will allow them to offer local service. But that theory starts from the premise that MCI WorldCom and Sprint are not yet fully capable of offering such service. In fact, each already can – and does – offer local service in numerous markets across the country. Sprint is the sixth largest incumbent local exchange carrier ("ILEC") in the country, and MCI WorldCom is among the nation's largest competitive local exchange carriers ("CLECs"). As the Commission has repeatedly pointed out, each of the Applicants, alone, is amply capable of competing in the local exchange.

Indeed, far from being a justification for the Application, the merger's impact on local competition is, at least under the logic of the Commission's recent precedents, a reason to deny it. MCI WorldCom provides facilities-based competition in 13 metropolitan statistical areas ("MSAs") in which Sprint is the incumbent, and in an additional 8 MSAs adjacent to Sprint territory. The Commission has professed the view that any reduction *at all* in local exchange competition – be it actual competition or potential competition – amounts to a public-interest harm. Although SBC continues to question the doctrinal soundness of that approach, unless the Commission is to reverse course, it must apply it here as well.

MCI WorldCom and Sprint also express the hope that, together, they will make broadband access via Multichannel Multipoint Distribution Service ("MMDS") a commercial reality. But even if the merger provided some incremental boost to MMDS – and it is far from clear that it would – that would be far too small a gain to justify the enormous competitive harms the merger will exact in the long distance and Internet backbone markets. So too with wireless/paging. If MCI WorldCom wants to offer wireless service, it should purchase or develop a wireless asset, or enter into a joint venture with a wireless company. It should not be allowed to eviscerate competition in other major markets.

Before the
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Washington, D.C. 20554

In re Applications of	)	
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SPRINT CORPORATION,	)	
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for Consent to Transfer Control of Corporations Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 1, 21, 24, 25, 63, 73, 78, 90, and 101	)	

OPPOSITION OF SBC COMMUNICATIONS INC.

MCI WorldCom and Sprint ("Applicants") bear a heavy burden of demonstrating that their merger will promote competition. Yet, far from promoting competition, this merger will reduce competition in no fewer than three critical segments of the telecommunications industry.

In the wake of the Telecommunications Act of 1996 ("1996 Act"), the Commission has set a high bar for telecommunications companies hoping to merge. "In order to find that a merger is in the public interest," this Commission must "be *convinced* that it will enhance competition."[1] A merger satisfies this standard only if "the harms to competition – *i.e.*,

[1] Memorandum Opinion and Order, *Applications of NYNEX Corp. and Bell Atlantic Corp. For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd 19985, 19987, ¶ 2 (1997) (emphasis added) ("*Bell Atlantic/NYNEX*"); *see also* Memorandum Opinion and

enhancing market power, [or] slowing the decline of market power . . . are outweighed by benefits that enhance competition. If applicants cannot carry this burden, the applications must be denied."[2]

The public interest will be harmed by this merger in several respects. *First*, this merger will have devastating effects on competition in the already-concentrated long distance market. Its harmful effects will radiate to all levels of this market – from retail to wholesale, mass market to large business. Residential, business, and wholesale long distance customers (including resellers) will all confront higher prices if the Commission allows an MCI WorldCom/Sprint conglomerate to form. *Second*, this merger will give the combined entity a dominant position in the evolving market segment for non-Internet packet-switched data services, such as frame relay, asynchronous transfer mode ("ATM"), X.25, and switched multimegabit data services ("SMDS"). The Applicants would dominate this increasingly important area just as they would dominate the market for long distance voice. *Third*, this merger would result in unthinkable levels of concentration in the critical market for Internet backbone services. The merger would unite the top two providers in this market, and, together, they would control at least half of the market.

Order, *Applications of Ameritech Corp. and SBC Communications Inc. For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, 14 FCC Rcd 14712, 14738, ¶ 49 (1999) ("*SBC/Ameritech*"); Comments of MCI WorldCom, Inc. at 1, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corp., Transferor, to SBC Communications Inc., Transferee*, CC Docket No. 98-141 (FCC filed Oct. 15, 1998) ("*MCI WorldCom SBC/Ameritech Comments*") ("Under its now well-established standards for merger reviews, the Commission must determine whether [Applicants] have carried their burden to prove by a preponderance of the evidence that their merger would affirmatively serve the public interest.").

[2] *Bell Atlantic/NYNEX*, 12 FCC Rcd at 19987, ¶ 2.

Because the Applicants have no answer to the harms that this merger threatens in long distance voice, data services, and Internet backbone services, the Applicants essentially ignore them. Instead, the Applicants' main response to the immediate and significant threats that this merger poses is to dismiss the well-established analytical framework this Commission uses to review mergers. Rather than analyzing and defending the merger on the basis of markets that exist today and that the Commission has consistently recognized, the Applicants prefer to invent a new "all distance" market that may exist in the future. Application at 9, 11. The Commission does not evaluate mergers based on hypothetical theories; it reviews merger based on current market conditions. And, in that context, this merger is indefensible.

It is hard to imagine *any* set of countervailing efficiencies that could save this merger. Certainly, the alleged savings proposed by the Applicants fall far short. The efficiencies claimed by the Applicants are insignificant and, in any event, are not causally connected to the merger. In short, this merger should fail under *any* rational review of competitive effects; it certainly falls short of satisfying the Commission's threshold of promoting the public interest.

SBC Communications Inc. ("SBC") is particularly concerned with the harmful effects that this merger will have in the long distance and Internet backbone services markets. If this merger is consummated, long distance prices will almost certainly increase, which, in turn, will lead to a decrease in the volume of long distance calls originating or terminating in SBC's local exchange service area. SBC sells exchange access for these calls, so SBC will suffer as a result of this decline. SBC would be harmed by this merger in a second respect as well: SBC currently purchases wholesale long distance service for its wireless business and expects to purchase even more transport in the future as it enters the long distance business. As discussed below, this merger poses a substantial threat to competition in the market for wholesale long distance, where

SBC is a buyer. This merger would also have anticompetitive effects in the market for Internet backbone services. SBC purchases backbone services as an Internet service provider ("ISP") and is concerned that a merged MCI WorldCom/Sprint will dominate this market.

DISCUSSION

Through participation in recent merger proceedings, SBC is quite familiar with the Commission's requirements for showing that a major transaction is in the public interest. As SBC demonstrates in these comments, Sprint and MCI WorldCom fall far short. SBC first describes the anticompetitive effects that this merger would have on long distance voice, packet-switched data services, and Internet backbone services. SBC then demonstrates that the Applicants' response is woefully inadequate to override the merger's harms.

I. THE MERGER WILL ADVERSELY AFFECT COMPETITION IN LONG DISTANCE

Today, the Big Three – AT&T, MCI, and Sprint – dominate the highly concentrated long distance market. AT&T's former Executive Vice President of the Consumer and Small Business Division has stated that, "as former architect" of AT&T's pricing policies, "I know [the long-distance industry is] oligopolistic."[3] The Commission, too, has repeatedly noted its "concern[s] . . . that not all segments of [the long distance] market appear to be subject to vigorous competition," and "about the relative lack of competition among carriers to serve low volume long distance customers."[4] Low-volume customers have been the hardest hit, as the major incumbent carriers have moved in synchronicity to impose minimum usage requirements and

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[3] *Nacchio Questions "Flow-Through" of Access Charge Reductions*, TR Daily, Mar. 13, 1998.

[4] Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In* Michigan, 12 FCC Rcd 20543, 20552-53, ¶ 16 (1997).

other fixed fees.[5] Residential callers continue to pay higher and higher prices, even as the Big Three's costs are falling.[6] Although the lack of competition in the residential long distance market is the more pronounced, it is undeniable that the business market is also highly concentrated. In fact, the merger threatens to undo the emerging competition that does exist for high-volume and price-sensitive customers. The state of the long distance market in the wake of the MCI/WorldCom merger led Chairman Kennard to remark that, once that merger was on the books, "the industry [would] again be poised just a merger away from undue concentration."[7] MCI WorldCom and Sprint now ignore that blunt warning and propose further to consolidate the long distance industry.

Looking at "a single national market," encompassing all long distance revenues of interexchange carriers,[8] the merger is plainly anticompetitive. MCI WorldCom/Sprint would control 36% of the nation's long distance business, with AT&T at 43%, and the remaining 21% splintered among numerous second-tier carriers, none with more than a 2.5% share and most

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[5] MacAvoy Aff. ¶ 112, *Application of Bell Atlantic-New York for Authorization to Provide In-Region, InterLATA Services in New York Under Section 271 of the Communications Act*, CC Docket No. 99-295, App. A (FCC filed Sept. 29, 1999) ("New York 271 Application, App. A").

[6] *See* Kahn & Tardiff Aff. ¶¶ 12-20, *Application by SBC Communications Inc., et al., For Provision of In-Region, InterLATA Services in Texas*, CC Docket No. 00-04, App. A (FCC filed Jan. 10, 2000) ("Texas 271 Application, App. A"); Schmalensee & Brandon Aff. ¶¶ 13-14, Texas 271 Application, App. A.

[7] FCC News Release, *Press Statement of FCC Chairman William E. Kennard on Merger of WorldCom and MCI*, Sept. 14, 1998.

[8] *See* Memorandum Opinion and Order, *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025, 18040, ¶ 24, 18042, ¶ 30 (1998) ("*MCI/WorldCom*") (Commission "analyz[es] the [merger's] competitive effects . . . on domestic, interstate, interexchange services" in "a single national market"); Order, *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, 3286, ¶ 22 (1995).

much smaller than that.[9] Measured by the HHI, these numbers add up to an increase in market concentration of more than 500 points, to over 3100, more than *five* times the increase necessary to create a presumption of unlawfulness under the *Merger Guidelines*.[10] Indeed, even including intraLATA toll in this single "national market" – which, as the Commission appeared to recognize in *MCI/WorldCom*, makes very little sense[11] – the merger is off the charts. MCI WorldCom/Sprint would possess a 32% share of all toll service revenues, to AT&T's 38.7%.[12] The merger would increase the HHI more than 400 points, to over 2100, again easily creating a presumption of unlawfulness.

These national concentration figures only begin to tell the story. As the Commission has recognized, the "single" national long distance market is actually made up of distinct customer segments with varying needs and options. And it is in reviewing these segments – the mass

[9] *See* FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone Service*, Tables 11.2, 11.3 (Sept. 1999).

[10] The HHI measures the likelihood that a merger will facilitate the exercise of market power. *See* United States Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* (1997) ("*Merger Guidelines*"). The Guidelines "divide[] the spectrum of market concentration as measured by the HHI into three regions that can be broadly characterized as unconcentrated (HHI below 1000), moderately concentrated (HHI between 1000 and 1800), and highly concentrated (HHI above 1800)." *Id.* § 1.5. The Department of Justice "will consider both the post-merger market concentration and the increase in concentration resulting from the merger." *Id.* § 1.51. In highly concentrated markets, "[m]ergers producing an increase in the HHI of more than 50 points . . . potentially raise significant competitive concerns." *Id.* In addition, "[w]here the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise." *Id.* The HHI totals we use are conservative because they are based only upon the market shares of AT&T, MCI WorldCom, and Sprint. The calculation of the change in HHI, however, is unaffected because it merely measures the pre- and post-merger difference in market share among MCI WorldCom and Sprint; all other shares would remain constant, and therefore need not be counted for that purpose.

[11] In *MCI/WorldCom*, the Commission focused on the "competitive effects of this merger on domestic, interstate, interexchange services." 13 FCC Rcd at 18040, ¶ 24. It did not consider intraLATA toll service in this analysis.

[12] *See Trends in Telephone Service*, Table 11.4.

market and the larger business segments – that the full threat posed by the merger becomes visible.

A. The Merger Will Adversely Affect Competition in the Mass Market

Under Commission precedent, the "mass market," consisting of "residential customers and small business[es]," is a "distinct product market[]." *MCI/WorldCom,* 13 FCC Rcd at 18040, ¶ 24; *see also Bell Atlantic/NYNEX,* 12 FCC Rcd at 20016, ¶ 53. Unlike the MCI/WorldCom merger, this merger proposal directly and substantially impacts this market segment, for each of the merging parties is indisputably "a significant competitor in the provision of long distance services" to the mass market. *MCI/WorldCom,* 13 FCC Rcd at 18044, ¶ 33. Indeed, mass market consumers would feel the effects of the proposed merger most severely.

1. Mass Market Concentration

Nationally, MCI WorldCom/Sprint's 24% post-merger share and AT&T's 58% share of residential long distance revenues would each dwarf the 3% share of the next largest carrier (Teleglobe).[13] These numbers translate into a 200+ point increase in the HHI, to almost 4000, more than double the increase necessary to create a presumption of unlawfulness.

Reported shares of presubscribed access lines paint an equally grim picture. In 1997, the most recent year for which data are available, AT&T had 67% of long distance residential access lines, MCI 13%, and Sprint 6%. Even these numbers translate into an HHI increase of almost 150 points, to more than 4850.[14]

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[13] *See Trends in Telephone Service*, Table 11.5 (long distance carrier revenues only). We are measuring concentration only in the residential portion of the mass market, not the small business portion, because the available data do not account separately for the small business portion of the mass market.

[14] *See* FCC, Common Carrier Bureau, Industry Analysis Division, *Long Distance Market Shares*, Table 4.1 (Mar. 1999).

2. MCI WorldCom and Sprint Are Each Other's "Next Closest Substitute"

The mass market concentration figures only begin to describe the competitive harm that would result from the merger in the highly concentrated long distance market. The little existing competition in this market is for the small subset of high-volume and price-sensitive residential customers. But the merger threatens to undo even this emerging competition, because it has been driven by MCI WorldCom and Sprint.

MCI WorldCom and Sprint are each other's "next closest substitute," which is to say that they compete with one another to a greater extent than either competes with AT&T (or with any other carrier). Accordingly, with respect to product substitution, the HHI calculations are over-inclusive, and they understate the actual competitive harms of the merger.[15]

As explained in the attached declaration of Dennis W. Carlton and Hal S. Sider ("Carlton & Sider Decl."), who supported the MCI/WorldCom merger but oppose this merger because it raises "distinct competitive concerns," Carlton & Sider Decl. ¶ 4, the MCI WorldCom-Sprint rivalry is best understood by examining the Applicants' respective pricing innovations, which tend to respond to one another's efforts to attract high-volume customers. In 1991, for example, MCI's "Friends and Family" promotion introduced discounts for residential subscribers on calls to other, designated MCI customers. Sprint answered with "The Most," offering discounts on calls to the number a subscriber dials most frequently. In 1995, Sprint's "dime-a-minute" promotion was the first to offer flat-rated discounts to subscribers who made numerous calls, period. Other initiatives, offering low per-minute charges coupled with fixed monthly fees have

[15] *See, e.g., Merger Guidelines* § 1.11; *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1053 n.11 (8th Cir. 1999).

followed this same pattern of targeting high-volume and price-sensitive consumers. AT&T sometimes joined in these pricing changes, but never initiated them.

Table 1. MCI, Sprint, and AT&T Promotions, 1991-1999	
Discounts on Selected Calls	**MCI: "Friends and Family" – March 1991** Consumers receive 20% discount on calls to a list of 12 people subscriber calls most, provided they also are MCI customers[1] **Sprint: "The Most" – June 1992** Subscribers save 20% on calls to the number they call most frequently, regardless of which carrier serves the called party[2] **AT&T: "I Plan" – February 1993** 25% off calls to a single area code, and 15% off other domestic calls, for customers spending more than $30 per month on domestic long distance calls[3]
Flat-Rate Pricing	**Sprint: "Sprint Sense" – January 1995** The first flat-rate plan: state-to-state evening and weekend rates of 10 cents a minute, and a flat rate of 22 cents a minute for peak calls[4] **AT&T: "AT&T One Rate" – September 1996** 15 cents a minute, 24 hours a day, without geographic limitations[5] **MCI: "MCI One Net Savings" – February 1998** Customers receive flat rate of nine cents a minute for state-to-state long distance calls, in addition to MCI Five-Cent Sundays[6]
Off-Peak Discounts	**MCI: "5-Cent Sundays" – September 1997** Residential customers receive flat rate of 5 cents a minute on all state-to-state calls on Sundays; $1.95/month[7] **AT&T: "Nickel Rate Plan" – September 1998** 10 cents a minute base rate, with 5-cent weekends; $4.95/month[8] **Sprint: "Nickel Nights" – July 1999** Residential state-to-state long distance phone plans that offer rate of five cents a minute during weekday evenings; $5.95/month[9]
Free Calling	**Sprint: "Free Sundays" – December 1999** One hour of free calling every Sunday night, together with five cents a minute during weekday evenings; $5.95/month[10] **MCI WorldCom:** No response to date **AT&T:** No response to date

[1] B. Ziegler, *MCI Announces "Friends & Family" Discount Plan*, Assoc. Press, Mar. 18, 1991.
[2] R. Gareiss, *Sprint Goes for "The Most" to Rival MCI Calling Plan*, InternetWeek, June 15, 1992.
[3] C. Skrzycki, *AT&T Launches Ad Campaign Touting "Personalized" Service*, Wash. Post, Feb. 19, 1993, at F1.
[4] *Sprint Lifts the Veil Off Long Distance Calling; New Calling Plan Offers Low Flat Rates*, PR Newswire, Jan. 5, 1995.
[5] *AT&T Unveils Flat Rate Plan, Warns of Lower Earnings*, Newsbytes, Sept. 24, 1996.
[6] *MCI Introduces MCI One Net Savings; Power of Internet Gives Consumers Unprecedented Long-Distance Savings*, PR Newswire, Feb. 27, 1998.
[7] *MCI Makes Sunday the Day to Call; MCI Automatically Gives 5-Cent Sundays to All MCI Customers*, PR Newswire, Sept. 8, 1997.
[8] L. Lavell, *AT&T Offers Nickel Rate Plan*, Record, Sept. 25, 1998, at B1.
[9] *Sprint Corp Unveils Five-Cent-A-Minute Weekday Calling Plan*, Wall St. J., July 20, 1999, at C19.
[10] Sprint Press Release, *Sprint Expands Sprint Nickel Nights Offer with Free Sunday Night Calling*, PR Newswire, Dec. 27, 1999.

Of course, most residential customers do not, or cannot, use these plans. For example, as of January 1999, 42% of AT&T's residential customers in Texas paid basic rates, or even more than the basic rates because they signed up for an inappropriate calling plan.[16] Another 13% of AT&T's Texas residential customers had no toll usage, and were subject to AT&T's ever-rising monthly fees (now totaling $5.89 per month)[17] even though they made no calls.[18] Thus, 55% of AT&T's Texas residential customers derived no benefit at all from the hypothetically available calling plans. The introduction of flat-rate calling plans has done little to serve most residential customers. To the contrary, "the majority of small- to medium-intensity users will realize effective price *increases*."[19]

These pricing initiatives have worked, however, insofar as they were designed to capture the small portion of high-volume, price-sensitive customers. As borne out by revenue-per-line data, MCI WorldCom and Sprint have won-over a disproportionate number of high-volume residential (and business) customers, leaving the lower-volume consumers to AT&T.

Table 2. Revenue per Presubscribed Line, 1996

	Presubscribed Lines	Revenue (in millions)	Revenue per Line
AT&T	99,821,499	$39,264	$393.34
MCI	24,338,086	$16,372	$672.69
Sprint	10,905,940	$7,944	$728.41

Source: Schmalensee & Brandon Aff. ¶ 41, Texas 271 Application, App. A.

Customer "churn" data reinforce the point that MCI WorldCom and Sprint compete more with one another than they do with other carriers (such as AT&T). *See* Carlton & Sider Decl.

[16] *See* Brief in Support of Application by Southwestern Bell for Provision of In-Region, InterLATA Services in Texas at 51, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas*, CC Docket No. 00-04 (FCC filed Jan. 10, 2000).

[17] AT&T, *Rate Information*, <http://www.att.com/rate_info/updates.html> (visited Jan. 6, 2000) (listing monthly minimum fee of $3.00, Universal Connectivity Charge of $1.38, and Carrier Line Charge of $1.51).

[18] Kahn & Tardiff Aff. ¶ 25, Texas 271 Application, App. A.

[19] MacAvoy Aff. ¶ 113, New York 271 Application, App. A.

¶¶ 32-38. MCI WorldCom and Sprint customers switch presubscribed carriers more frequently than AT&T customers do. Indeed, MCI WorldCom loses almost 9% of its residential long distance customers each month, and Sprint loses 8.1%, while AT&T loses only 4.7% per month. MCI WorldCom and Sprint must therefore work harder than AT&T to maintain their existing customer bases. And the customers they attract tend to be one another's – that is, MCI WorldCom attracts a disproportionately high number of former Sprint customers, and Sprint attracts a disproportionately high number of former MCI WorldCom customers. *See id.* ¶¶ 36-38. As Professor Jerry A. Hausman explains, Sprint's cross price elasticity with MCI WorldCom is more than twice the cross price elasticity of AT&T, further proving that MCI WorldCom and Sprint are each other's closest competitor. Hausman Decl. ¶ 22.

For consumers, therefore, Sprint and MCI WorldCom are closer substitutes to one another than either is to AT&T. Merging the two into one will have a greater impact than even the vast increases in the HHI would predict. Currently, Sprint is able to constrain MCI WorldCom's prices. *Id.* ¶ 23. Based on an econometric analysis, the elimination of Sprint is likely to result in price increases of 5.4% for MCI WorldCom and 8.9% for Sprint. *Id.* ¶ 24. Carlton and Sider's analysis of stock prices following the merger announcement also confirms that the price of long distance services (both retail and wholesale) will rise as a result of the proposed transaction. *See* Carlton & Sider Decl. ¶¶ 49-58.

3. Neither "New" Capacity Nor RBOC Entry Diminishes the Threat Posed by the Merger

MCI WorldCom and Sprint recognize that the prospect of consolidating their long distance operations raises serious "questions." Application at 29. They argue, however, that those questions are answered by the prospect of new entry into long distance. In their view, new capacity put in place by existing second-tier carriers, along with RBOC entry under 47 U.S.C.

§ 271, will prevent MCI WorldCom/Sprint and AT&T from abusing their market positions. These claims, which serve to highlight the absence of sufficient *existing* competition to support the proposed merger, fail. Though MCI WorldCom and Sprint claim that entry into the long distance market is "easy,"[20] they cannot point to a single entrant that will have the ubiquitous presence to compete against the Big Two, not to mention such a carrier with the brand name recognition that is so critical for serving the mass market.

a. "New" Capacity

Taking their cue from this Commission's analysis in *MCI/WorldCom*, MCI WorldCom and Sprint defend their proposed transaction on the basis of "increased" capacity in the long distance market. Application at 41. If MCI WorldCom/Sprint were to abuse its market position, the argument goes, residential customers would switch to second-tier carriers such as Qwest, Global Crossing/Frontier, IXC, Williams, and Level 3. *Id.* at 51.

i. The Second-Tier Carriers Lack Brand Names, a "Critical" Asset in the Mass Market

The parties' reliance on second-tier carriers ignores the importance of brand in the mass market. As even the Applicants acknowledge, the Commission views "brand recognition, reputation, and local customer base" as essential to serving the mass market. *Id.* at 49 (citing *MCI/WorldCom*, 13 FCC Rcd at 18099, ¶ 132). Indeed, "brand name recognition is a 'critical' asset for offering services in the mass market," and, although such recognition can be developed over time, "the need to do so may render a competitor incapable of having an effect on competition" for several years at least. *MCI/WorldCom*, 13 FCC Rcd at 18122, ¶ 171 & n.470; *see also SBC/Ameritech*, 14 FCC Rcd at 14754-55, ¶¶ 87-88; *Bell Atlantic/NYNEX*, 12 FCC Rcd

[20] *See* Applicants' Reply to Protests to Application for Approval to Transfer Control of Sprint Corporation's California Operating Subsidiaries to MCI WorldCom, Inc. at 15, Application No. 99-12-012 (Cal. PUC filed Feb. 11, 2000) ("*Applicants' California Reply*").

at 20016, ¶ 53, 20021, ¶ 62, 20031, ¶ 84. A brand name alone can substantially increase market share by ensuring customers that they will receive consistent, quality service.[21] As Carlton and Sider demonstrate, customers will stay with a brand-named carrier even in the presence of lower-priced alternatives. Using the actual calling patterns of AT&T customers, Carlton and Sider found that Excel, Qwest, or Frontier offered lower rates than AT&T for more than 95% of AT&T's residential customers – yet those customers remain with AT&T. Carlton & Sider Decl. ¶ 27 & Table 5. Indeed, AT&T has nearly 10 times more residential subscribers than Excel, Frontier, and Qwest *combined. Id.* ¶ 28. *See also* Hausman Decl. ¶ 13 (noting that Qwest's customers paid between 7-12% less than AT&T customers, but Qwest did not take a significant share from AT&T). These actual consumer patterns belie claims by MCI WorldCom and Sprint that "consumers have demonstrated a ready willingness to switch carriers based solely on price" without regard for brand name.[22] Rather, as Professor Hausman explains, long distance products are not perfect substitutes for one another – instead, there is a great divide between the three heavily branded products and the "numerous other 'generic' carrier products." Hausman Decl. ¶¶ 13, 18-20.

"Anyone who has ever made a phone call knows AT&T's name. And with more than 80% consumer awareness, MCI and Sprint are not far behind."[23] The second-tier carriers, in

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[21] *See* AT&T's and McCaw's Response to Comments on Hart-Scott-Rodino Materials at 25-26, *American Telephone and Telegraph Company and McCaw Cellular Communications, Inc., Application for Consent to Transfer of Control of Radio Licenses*, File No. ENF-93-44, DA 93-1119 (FCC filed July 1, 1994) (citing market research that AT&T's brand name would give McCaw a 5% increase in market share; "[b]y assuring customers that they were receiving the highest quality service, the branded offering would 'prevent confusion,' assure consistency in 'service quality, feature availability and offers' and 'clarify the value of wireless services to each customer segment'").

[22] *Applicants' California Reply* at 30.

[23] V. Demski, *Finding a Formula for Success*, Telephony, Feb. 3, 1997, at 74.

contrast, are virtually anonymous among consumers. As the Commission has already recognized, the "smaller IXCs generally lack the brand reputation and recognition . . . that are critical assets for offering services to the mass market." *Bell Atlantic/NYNEX*, 12 FCC Rcd at 20031, ¶ 84. Not a single one of the second-tier carriers relied on by the Applicants has the brand name or service reputation necessary to compete with the MCI, Sprint, or AT&T brands, and the Applicants do not claim otherwise. *See* Hausman Decl. ¶ 20 (noting that the Applicants' economists fail to provide any evidence on the cross price-demand elasticities that would support their claim of a high degree of a price-constraining effect by "generic" carriers).

There is not much of a chance that these second-tier carriers will develop the brand names necessary to compete any time soon. The strength of the MCI, Sprint, and AT&T brands are a result of decades of service, and an enormous amount of advertising. In 1998, for example, AT&T spent approximately $1.4 billion on advertising in the United States, placing it seventh among all advertisers. *See* Carlton & Sider Decl. ¶ 17. That same year, MCI WorldCom spent $948 million, and Sprint spent $671 million, placing them 17th and 31st, respectively, among all advertisers. No other long distance carrier was among the top 200 advertisers in 1998. *Id.* These companies spend more money on marketing alone each year than most second-tier carriers earn overall. For example, each of the Big Three's advertising budgets in 1998 dwarfed the total revenues of major second-tier carriers such as Global Crossing and Level 3.[24] The second-tier carriers simply do not have the resources to compete at this level. As Qwest has observed: "AT&T and MCI each spend hundreds of millions of dollars annually in advertising and direct marketing to the public to promote their brand and products. . . . Qwest does not have the name

[24] *See* Global Crossing, *1998 Annual Report* at 2 (listing 1998 revenues at approximately $424 million); Level 3 Communications, *1998 Annual Report* at 19 (listing 1998 revenues at approximately $392 million).

brand recognition and financial resources to compete at this level, even though we are able to provide long-distance services of equal or better quality at lower prices."[25]

MCI WorldCom and Sprint acknowledge that the lack of brand reputation will limit the strength of second-tier carriers in the mass market, but their response – pointing to "the increased penetration of dial-around services" – is inadequate. Application at 49. The term "dial-around" is itself a misnomer, since consumers using these services are more often than not dialing into one of the Big Three. In fact, MCI WorldCom alone has about 45% of the dial-around market. Besen & Brenner Decl. ¶ 63 & Table III-2, Application, App. B. Indeed, MCI led the charge in dial-around advertising spending. MCI WorldCom has spent $274 million on three services – 10-10-220, 10-10-321, and 10-10-9000, a dial-around directory service.[26] "It plowed $178.7 million into 10-10-321 long distance service, up from $79 million in 1997; it supplied $65.3 million to inaugurate the 10-10-220 long distance service; and placed $30 million behind the new 10-10-9000 directory service that hooks callers to a live operator for a fee."[27] As one analysis has put it, "[t]he only carriers that will find success in dial-around service are those that can afford to go up against the advertising budget of MCI WorldCom and AT&T. Those who can't will have to focus on going after very specific markets, such as calls to a particular country."[28] These services, therefore, are analogous to the pricing plans described in Table 1 – attempts by

[25] Declaration of Stephen Jacobsen (Senior Vice President – Consumer Markets, Qwest Communications) on behalf of Ameritech Corporation ¶ 7, *AT&T Corp. v. Ameritech Corp.*, File No. E-98-41 (FCC filed June 22, 1998).

[26] K. Fitzgerald, *Back-To-Basics Loyalty Campaigns Get Telcoms Focus; Long Distance: Dial-Around Service Support Trimmed*, Advertising Age, Sept. 27, 1999, at S18.

[27] R. Endicott, *Top 100 Megabrands: Despite Gm Strike, Chevy Holds Off MCI*, Advertising Age, July 12, 1999, at S1.

[28] D. Allen, *Dialing Around for Dollar$ . . . and Cu$tomer Market Share; Industry Trend or Event*, Telecommunications, Apr. 1, 1999, at 37 (quoting Fred Volt, senior analyst for consumer market convergence at Yankee Group).

the Big Three to attract high-volume and price-sensitive residential consumers with massive national advertising.

ii. The Second-Tier Carriers that Serve the Residential Market Lack Geographic Ubiquity

The lack of brand name identity among second-tier carriers makes them inadequate substitutes for the Big Three. Yet, even apart from this crucial deficiency, MCI WorldCom's and Sprint's reliance on "new" capacity is strained. The Applicants ignore that, for many mass market consumers, especially in areas with low population density, the second-tier carriers offer no realistic hope of disciplining MCI WorldCom/Sprint's and AT&T's market power. And the "public interest" assuredly includes the consumers in these areas.

In the first place, a number of the carriers upon which MCI WorldCom and Sprint rely do not serve the residential market at all. Williams, IXC, Level 3, Cable & Wireless, and Metromedia Fiber Networks, among others, have all decided that the residential market does not, at least for now, present a viable commercial opportunity.[29] They therefore provide little hope for consumers faced with diminished competition in the mass market.

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[29] *See, e.g.,* Williams Communications, *about us*, <http://www.williamscommunications.com/aboutus/index.html> ("Williams Communications owns or leases, operates and is extending a nationwide fiber optic network focused on providing voice, data, Internet and video services to communications service providers"); IXC Communications, *Products,* <http://www.ixc-comm.com/products/products.htm> ("With a firm understanding of today's diverse communication industry, IXC provides total solutions for Internet service providers, CLECs, resellers, RBOCs, local phone companies, long-distance carriers, cable television, utility companies and independent telephone companies."); Jack Lyne, *Level 3: Building at the Speed of Broadband*, Site Selection Magazine, Sept. 1999 (Level 3's network is "custom-tailored" to attract "coveted big-ticket business users" whose data needs may be underserved); Cable & Wireless, *Businesses: Businesses by Region, Cable & Wireless USA* ("Cable & Wireless USA is the United States' largest long distance company exclusively serving businesses"); New Paradigm Resources Group, Inc., *CLEC Report 2000* at Metromedia Fiber Network, Inc. at 5, 10-12 of 13 (11th ed. 2000) (Metromedia Fiber Network derives 100% of its revenues from dedicated dark fiber networks; the company does not offer switches services, and therefore neither holds nor plans to deploy any voice or data switches). *See also* Electric Lightwave, *About ELI: Company Description*, <http://www.eli.net/about/index.shtml> ("Electric Lightwave

Moreover, even those carriers that do serve the residential market have limited reach. MCI WorldCom, Sprint, and AT&T have the only long distance networks that are truly national in scope. Hausman Decl. ¶¶ 35, 37 & Table 2. MCI WorldCom's own vice president for marketing and advertising has acknowledged the critical importance of a nationwide presence: "[F]or a carrier seeking a nationwide entry strategy, the mass market is most efficiently addressed on a national, demographic basis, not a regional, geographic basis."[30] Qwest, which has the most extensive coverage of any of the second-tier carriers, reaches barely one-half of the LATAs served by AT&T. Indeed, more than 10% of the population would reside in an area served by only two facilities-based long distance carriers after the merger. *Id.* ¶ 38 & Table 3. Almost 20% would reside in an area served by just three facilities-based long distance carriers. *Id.* ¶ 39 & Table 3.

Thus, notwithstanding Commission precedent describing a single national market, it is misleading to suggest that the effect of this merger will be uniform throughout the country. While consumers in New York will be hurt by the merger, they still will have more facilities-based choices than consumers in rural states with low population density. In some states, such as Maine, West Virginia, and New Hampshire, there are no facilities-based options outside the Big Three; the merger would therefore reduce the number of facilities-based carriers in these states

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builds and operates all-digital, high-speed fiber optic networks for businesses and long distance carriers across the United States."); *Teleglobe Flies with Voice over IP Service*, Fiber Optics News, Sept. 27, 1999 ("This is primarily a service for businesses"); *CapRock Details AT&T Agreement*, Bus. Wire, Jan. 24, 2000 (CapRock Communications "is a regional facilities-based integrated communications provider offering local, long-distance, Internet, data, and private-line service to small and medium-sized business customers"); GST Telecommunications, Inc., *Investors: Fact Sheet*, <http://www.gstcorp.com/investor/> (GST "provides a broad range of integrated telecommunications products and services, primarily to business customers in the western United States. With a super-regional presence in California and along the west coast, GST also provides communications services to interexchange carriers, large business customers, and government entities.").

from three to two. In many more states, consumers will see the number of facilities-based options drop from four to three. Indeed, one-fifth of the population will reside in a state with three or fewer facilities-based carriers following the merger. *Id.* ¶ 38 & Table 3.

To be sure, residential callers can also purchase service from resellers – assuming of course that these resellers somehow overcome the brand name obstacle. But these resellers by definition rely on competition among wholesale carriers. After this merger, that competition will be substantially diminished. According to recent Commission data on fiber system route miles, MCI WorldCom controls 30% of total capacity in the wholesale market, AT&T 25%, and Sprint 15%. The remaining 30% of capacity is spread among a number of carriers, the largest of which (Qwest and Frontier) each control just over 7.5%.[31] Because only the Big Three can provide ubiquitous wholesale long distance, *id.* ¶ 35, many parts of the country will witness a decline in wholesale carriers from three to two. And if a reseller wants to contract with a single carrier for ubiquitous coverage throughout the U.S., it will have only two options following this merger. If resellers are faced with higher prices because of a duopoly in the wholesale market, those higher prices will be passed on to consumers. Second-tier carriers will face the same competitive dilemma because they must obtain wholesale services in the areas where they do not operate. Because of a lack of brand name, consumers already shy away from resellers and second-tier carriers that charge less than the Big Three. Consumers certainly cannot be expected to turn to these carriers if their prices increase.

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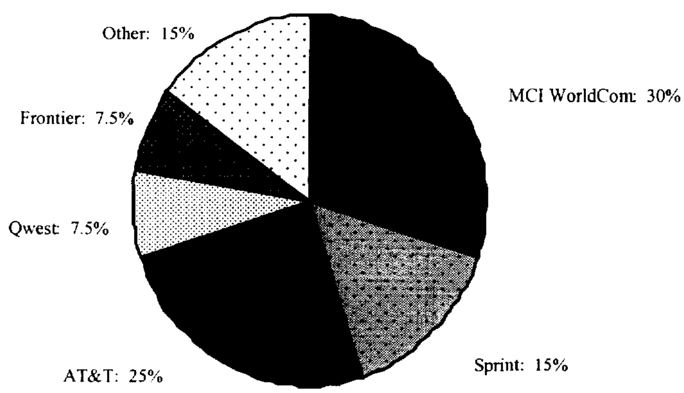
[30] Donoghue Aff.¶ 15, Application, App. C.

Figure 1. Total Capacity in the Wholesale Market



This dramatic effect on the wholesale market is one of several factors that serves to distinguish an MCI WorldCom/Sprint merger from the MCI/WorldCom combination. In that case, not only was WorldCom a virtual non-entity in the mass market, but its network scope, covering barely half of the nation's LATAs in disproportionately high-density areas, suggested it never would be a major player in this segment. *Id.* ¶ 39. The Commission recognized, correctly, that at least one other carrier (Qwest) was equivalent to WorldCom in both size and strategy, and it stressed that other second-tier carriers could, and perhaps would, grow to WorldCom's size and stature. *See MCI/WorldCom*, 13 FCC Rcd at 18052-55, ¶¶ 43-49, 18058, ¶ 54. The net effect of the MCI/WorldCom combination, in the Commission's view, was merely a "short run" increase in wholesale market concentration that would be unlikely to result in "anticompetitive effects." *Id.* at 18047, ¶ 36.

Here, by contrast, even MCI WorldCom and Sprint do not contend that any existing second-tier carrier matches Sprint in terms of size, scope, and geographic ubiquity, or that any

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[31] *See* FCC, Common Carrier Bureau, Industry Analysis Division, *Fiber Deployment Update End Of Year 1998*, Table 1 (Sept. 1999) ("*Fiber Update*"). These figures include total capacity, including capacity used by carriers for their own retail services.

could grow to that scale "within one year of . . . a small but significant and nontransitory price increase" resulting from the merger.[32] While the increase in wholesale market concentration in MCI/WorldCom was problematic – more than 400 points, to over 1800[33] – it pales in comparison to the 900-point increase this merger would create.[34] This markedly different market concentration would be anything but "short run," and the resulting anticompetitive effects would be substantial.

b. RBOC Entry

Regional Bell operating companies ("RBOCs"), SBC among them, possess the brand name and service reputation to compete with the Big Three within the RBOCs' respective regions. That is not to say, however, that RBOC entry would have the same impact on the Big Three equally or that an RBOC could readily replace Sprint as MCI WorldCom's closest competitor. Indeed, from SNET's experience in Connecticut, it appears that RBOC entry will result in low-volume customers migrating largely from AT&T, with MCI WorldCom and Sprint relatively unaffected.[35] Thus, even with RBOC entry, MCI WorldCom and Sprint remain each other's closest competitor, and their merger poses competitive dangers.

In any event, RBOC entry is not sufficiently certain to allay the anticompetitive effects of this merger. Although SBC and other RBOCs have made great strides in opening their local markets in numerous states, widespread in-region, interLATA entry is not sufficiently imminent

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[32] *Merger Guidelines* § 1.32 (internal quotation marks omitted).

[33] *See Fiber Update*, Table 1.

[34] This figure is derived using the companies' market share of total capacity depicted in Figure 1. The pre-merger HHI for the Big Three is 1750 and the post-merger HHI is 2650.

[35] *See* Murray Aff. ¶ 19 & n.26, Texas 271 Application, App. A (noting that AT&T's market share at the end of 1997 was half of what it was at the end of 1995, while the shares of MCI and Sprint increased slightly during the same period, "indicating that they were not severely affected

to counter the increased concentration that would result from the merger. With one exception (Bell Atlantic in New York), the RBOCs are legally prohibited from offering in-region, interexchange service. Without entry in numerous states, covering a substantial percentage of the nation's population, RBOC entry will be inadequate to constrain MCI WorldCom/Sprint and AT&T on a national basis.

i. The RBOCs Cannot Constrain MCI WorldCom/Sprint and AT&T Absent Widespread Section 271 Relief

MCI WorldCom and Sprint contend that RBOC entry in a handful of states would be sufficient to constrain MCI WorldCom/Sprint nationally. But national rate averaging, *see* 47 U.S.C. § 254(g), upon which they rely for this proposition, *see* Application at 53, will not have that effect. And, given the regulatory constraints on RBOC long distance service even after section 271 approval, it is unlikely that RBOC entry in a smattering of individual states would broadly constrain the Big Two.

Actual market experience confirms that incumbent interexchange carriers have the ability to ensure that RBOC entry in one state does not drive down prices elsewhere. Following SNET's 1994 interstate entry, the Big Three did *not* lower their national long distance rates to compete for interstate business in Connecticut. Instead, after the Commission refused to waive the geographic rate averaging requirements,[36] AT&T, MCI, and Sprint cut their *intra*state toll rates for customers who also purchased *inter*state service at the national rates.[37] In other words, SNET's long distance offering in Connecticut benefited consumers within Connecticut, but it did

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by SNET's entry and, conversely, that they had little to do with AT&T's share loss in Connecticut").

[36] *See* Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 9564, 9582-83, ¶¶ 38-41 (1996).

[37] *See* Murray Aff. ¶ 12, Texas 271 Application, App. A.

nothing to lower the long distance rates of consumers in other states. Now that Bell Atlantic has won long distance authority in New York, MCI WorldCom is taking a similar approach there. According to MCI WorldCom CEO Bernard Ebbers, MCI WorldCom's New York offering will "contain a bucket of local and long distance [minutes] that users could interchange under fixed monthly fee."[38] Thus, because MCI WorldCom, Sprint, and AT&T sell consumers intraLATA toll, local, wireless, cable, and other services with interstate, interexchange service, they will be able to match RBOC service bundles while keeping their nominal long distance rates at the pre-RBOC-entry levels – at least until the RBOCs are granted section 271 relief for a substantial number of RBOC lines. As things currently stand (and for the near future), RBOC entry is therefore critically important for those lucky consumers who live in the state in which such entry occurs, but its significance beyond that particular state is, at best, uncertain.

The inability of RBOCs widely to constrain MCI WorldCom/Sprint with limited entry is reinforced by the limits on such entry. Under section 272, an RBOC can provide in-region, interexchange service, if at all, only through an affiliate operating under structural separation requirements that are not imposed upon MCI WorldCom and Sprint. *See* 47 U.S.C. § 272; *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1049-50 (D.C. Cir. 1997). This requirement raises the affiliate's costs and, as applied by the Commission, precludes the affiliate from using the RBOC's network to provide interLATA services quickly on a facilities basis. Accordingly, RBOC affiliates providing in-region long distance will resell long-haul capacity, at least initially.[39] As discussed, this merger will reduce the number of ubiquitous wholesalers from three to two, so the RBOCs will find themselves dealing with a duopoly in the wholesale market in many areas of the country. For example, SBC plans to resell long distance services provided

[38] *See* Communications Daily, Jan. 13, 2000, at 6.

by Williams, which in turn buys wholesale service from Sprint. SBC would thus be adversely affected by the three-to-two reduction in ubiquitous wholesalers that this merger would produce. *See* Hausman Decl. ¶ 36.

ii. Widespread RBOC Entry Is Not "Imminent"

MCI WorldCom and Sprint also seek to downplay questions about the timing of RBOCs' in-region, interLATA entry, suggesting that widespread RBOC entry is "imminent." Application at 53. That characterization is difficult to square with the Applicants' description of that same entry in other proceedings. Moreover, this Commission has previously rejected efforts to justify mergers on the basis of prospective 271 entry, viewing such justifications as highly speculative. *SBC/Ameritech*, 14 FCC Rcd at 14843, ¶ 306.

Under the Department of Justice/Federal Trade Commission *Merger Guidelines*, market entry is meaningful only if it "can be achieved within two years from initial planning to significant market impact." *See* § 3.2. SBC filed its draft application for in-region long distance authority with the Texas Public Utilities Commission in March of 1998, following nearly two years of preparatory state proceedings. Almost two years after that, the application is still pending, now before this Commission.[40]

SBC certainly hopes that its Texas experience will not prove to be the norm, and that it will be able to enter in-region states in less than the four years (and counting) that it has taken in Texas.[41] But, regardless of SBC's hopes, the Commission has taken the firm view that

[39] *See, e.g.*, Breen Aff. ¶ 10, New York 271 Application, App. A.

[40] *See also* Supplemental Filing of Bell Atlantic and GTE at 32-33, *Application of GTE Corp. and Bell Atlantic Corp. For Consent to Transfer Control*, CC Docket No. 98-184 (FCC filed Jan. 27, 2000) (proposing that Bell Atlantic/GTE reacquire control over GTE's interexchange operations in five years, at which time Bell Atlantic expects to have widespread 271 relief).

[41] The timeliness of 271 entry turns in part on the "dedicated efforts" of the relevant state commission, and there in no guarantee that each state will add as much to the process as the

widespread 271 entry is too uncertain to justify a proposed merger. In *SBC/Ameritech*, the merging parties explained that, with 271 relief, the merged company could better pursue its National-Local Strategy of out-of-region local entry. The Commission, however, thought that the "uncertainty regarding section 271 approvals" made such arguments "speculative at best." *SBC/Ameritech*, 14 FCC Rcd at 14843, ¶ 306. So too here.

Moreover, MCI WorldCom's and Sprint's present description of RBOC entry as "imminent" is quite clearly hypocritical. MCI WorldCom and Sprint have fought RBOC entry at every turn. Indeed, at least one of the two has opposed every 271 application that has been filed to date.[42] They have characterized the prospect of RBOC long distance entry in terms such as "highly contingent," "remote[]," and "extremely premature."[43] Even the parties' merger

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Texas commission has. *Cf.* Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, FCC 99-404, ¶ 7 (rel. Dec. 22, 1999) ("*New York Order*") (discussing role of New York PSC in Bell Atlantic proceeding).

[42] Comments of MCI WorldCom, Inc. at 94, Texas 271 Application (FCC filed Jan. 31, 2000); Petition to Deny of Sprint Communications Co. L.P. at 85, Texas 271 Application (FCC filed Jan. 31, 2000); Comments of Sprint Communications Co. L.P. at 31-32, New York 271 Application (FCC filed Oct. 19, 1999); Petition to Deny of Sprint Communications Co. L.P. at 80, *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services to Louisiana*, CC Docket No. 97-231 (FCC filed Nov. 25, 1997) ("Louisiana 271 Application"); Comments of Worldcom, Inc. at 42, Louisiana 271 Application (FCC filed Nov. 25, 1997); Comments of MCI Telecommunications Corp. at 68, *Application of BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208 (FCC filed Oct. 20, 1997); Petition to Deny of Sprint Communications Co. L.P. at 49, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121 (FCC filed May 1, 1997); Petition to Deny of Sprint Communications Co. L.P. at 49, *Application by Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in Michigan*, CC Docket No. 97-137 (FCC filed June 10, 1997).

[43] Petition to Deny of Sprint Communications Co. L.P. at 48, *Applications of Ameritech Corp. and SBC Communications Inc. For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act*

application to the Commission contends that "a significant amount of time" will pass before a supposed condition of RBOC entry – competitive "local markets" – is satisfied. Kelly & Mercer Decl. ¶ 71, Application, App. A.

iii. Absent Widespread RBOC Long Distance Entry, a So-Called "All Distance" Market Cannot Save the Merger

Faced with the devastating competitive harm this merger will cause in existing markets, MCI WorldCom and Sprint ask the Commission to review the merger in the context of what they call "all distance" service offerings, Application at 9, 11, as if local service and long distance were part of the same market. In this proceeding, "the burden is on the Applicants to establish the relevant markets." *Bell Atlantic/NYNEX*, 12 FCC Rcd at 20014, ¶ 49. MCI WorldCom's and Sprint's suggestion of casting this merger in the context of a so-called "all distance" market falls well short of meeting that threshold. *See* Gilbert Decl. ¶¶ 12-14.

The companies that provide the great majority of local service across the nation – the RBOCs – are legally prohibited from offering long distance service in every in-region state save one.[44] Thus, any so-called market for "all distance" will be dominated by AT&T, MCI WorldCom, Sprint, and their local affiliates because these are the only companies with the established brand names and geographic ubiquity capable of providing the crucial long distance component of the bundle. Indeed, even if the RBOCs were to enter the long distance market in a

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and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, CC Docket No. 98-141 (FCC filed Oct. 15, 1998) (describing RBOC entry as "highly contingent and unlikely to be implemented within its stated time frame"); *id.* at 51-52 (RBOC entry into long distance is unlikely to occur in the near future, "[g]iven the remoteness of Section 271 compliance for these companies throughout their states"); MCI WorldCom Press Release, *MCI WorldCom Says PacBell's "271" Application is Premature*, July 16, 1999.

[44] *See Bell Atlantic/NYNEX*, 12 FCC Rcd at 20015, ¶ 51 ("[T]he MFJ's prohibition on Bell Company provision of interexchange services and the federal-state regulatory structure have lead to consumers facing different competitive alternative sources for local exchange and exchange access service and long distance service").

significant portion of the country, it would not discipline the Applicants' prices because interexchange carriers ("IXCs") are under no obligation to charge uniform nationwide prices for the non-interexchange portion of the bundle. RBOCs would have to receive 271 approval in almost every state to mitigate the anticompetitive effects of the merger on bundled offerings. Hausman Decl. ¶¶ 43-44.

In any event, MCI WorldCom and Sprint do not really believe their own "all distance" rhetoric. Application at 9, 11. If, as they claim, MCI WorldCom/Sprint's 32.4% share of the national long distance market is actually only 13.8% of the relevant "all distance" local and long distance market, then SBC's 88% share of local service in its Texas service areas is in truth only a 1.3% share of that larger market.[45] Under the Applicants' theory, it would have been impossible for MCI WorldCom and Sprint to oppose SBC's 271 application for Texas on the basis of arguments about the "Texas local market," given that SBC's share of the local market in Texas amounts to a mere 1.3% of the so-called "all distance" market.[46] Rather, it is clear that MCI WorldCom and Sprint believed that the Texas local market was, in fact, a distinct market and not part of some broader, "all distance" market. Indeed, both MCI WorldCom and Sprint historically have drawn a sharp line between local and long distance markets in their oppositions

[45] FCC, Common Carrier Bureau, Industry Analysis Division, *Telecommunications Industry Revenue: 1998,* Table 1 (Sept. 1999) (total telecommunications industry revenue, 1998); FCC, *Statistics of Communications Common Carriers*, Table 1.4 (Dec. 1999) (MCI WorldCom/Sprint total toll service revenues, 1998); Brief at 9, Texas 271 Application (FCC filed Jan. 10, 2000) (SBC local market share in Texas); FCC, ARMIS Data Retrieval System, 43-01: Table I (SWBT Texas local service revenues, 1998).

[46] *See* Comments of MCI WorldCom, Inc. at 1, Texas 271 Application (FCC filed Jan. 31, 2000) ("Southwestern Bell's application for section 271 authority is premature, as it plainly has not satisfied the competitive checklist nor irreversibly opened the Texas local market to competition."); Petition to Deny of Sprint Communications Co. L.P. at 74, Texas 271 Application (FCC filed Jan. 31, 2000) ("SWBT has not demonstrated that the Texas local markets have been irreversibly opened to competition.").

to 271 applications.[47] Similarly, when MCI and WorldCom sought license transfer approval from the Commission, they stated that "[t]he interexchange market is properly defined as a single product, nationwide market."[48]

Consumers do wish to purchase bundled service packages that include local and long distance service. But it does not follow that the traditionally distinct local and long distance markets will thereby entirely collapse into one another. State regulators, for instance, would be unlikely to assess toll-type charges on what were previously local calls or to accept flat monthly prices that would have to be high enough to cover all the local and long distance calls a consumer might make. *See* Hausman Decl. ¶ 14.

In any event, consumers' desire to buy two products together does not, for antitrust purposes, make those products part of a single market. The overwhelming majority of consumers buy local and long distance services separately, and, as Professor Gilbert explains, the two markets are unlikely to merge into one because customers have an incentive to mix and match individual service offerings in response to an increase in the price of a bundled offering. Gilbert Decl. ¶ 13. In addition, as the Commission has recognized, when it comes to business demand for service packages, long distance, not local, service is the part of the bundle that drives

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[47] *See, e.g.*, Petition to Deny of Sprint Communications Co. L.P. at 74-75, Louisiana 271 Application (FCC filed Nov. 25, 1997) ("But so long as the local market is kept closed by BOC behavior, there is no opportunity for any carriers other than the BOC to offer one-stop shopping. . . . It is thus preferable to allow for local market entry opportunities first, which can thereafter be quickly followed by additional entry into long distance markets."); Comments of MCI Telecommunications Corp. at v, Louisiana 271 Application (FCC filed Nov. 25, 1997) ("BellSouth's public interest argument rests on the fundamentally flawed premise that its entry into the already competitive long distance market would somehow force development of local competition, even though its bottleneck power remains firmly intact, and even though it has not taken the necessary steps to irreversibly open its local market to competition.").

[48] Second Joint Reply of WorldCom, Inc. and MCI Communications Corporation at vi, *Applications of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control*

consumer choice. *See SBC/Ameritech*, 14 FCC Rcd at 14841, ¶ 298 ("Not only are [SBC and Ameritech] at a competitive disadvantage in the long distance voice market, they are at serious disadvantage to . . . competitive LECs . . . in the data market where over 85% of large and medium business customer expenditures are for long-haul services.").

Accordingly, the Commission has adhered to the view that long distance service remains a "distinct" and relevant product market, and it is within that product market that the Commission must measure the merger's competitive harm.[49] In the mass market segment, that competitive harm would be substantial.

B. Business Customers Will Also Face Higher Prices and Diminished Service

While mass market consumers would feel the effects of the merger most severely, it also poses a substantial threat to the larger business market. The HHIs for business voice services are staggering. And that is only part of the story in the business long distance segment. As the Applicants have admitted, long distance business customers are nationwide – indeed, global – in scope and they demand a long distance offering that meets their needs.[50] But only the Big Three have ubiquitous networks. This lack of ubiquity will reduce the number of wholesale providers in the country from three to two in many rural and remote regions. Thus, the second-tier

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of MCI Communications Corporation to WorldCom, Inc., CC Docket No. 97-211 (FCC filed Mar. 20, 1998).

[49] *MCI/WorldCom*, 13 FCC Rcd at 18119, ¶ 164; *see also New York Order* ¶ 428; *Bell Atlantic/NYNEX*, 12 FCC Rcd at 20014-15, ¶¶ 50-51; Memorandum Opinion and Order, *Applications of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, For Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services*, 13 FCC Rcd 15236, 15247, ¶ 20 (1998); Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corp., Transferor, to SBC Communications, Inc., Transferee*, 13 FCC Rcd 21292, 21300, ¶ 16, 21303, ¶ 22 (1998).

[50] *Applicants' California Reply* at 32-33.